No. 224.

JUL 3 1944
CHARLES ELMORE CROPLEY
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In the Supreme Court of the United States

October Term, 1943.

ELASTIC STOP NUT CORPORATION, *Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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No. ———.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petitioner Elastic Stop Nut Corporation respectfully prays that a writ of certiorari issue to review a decree of the United States Circuit Court of Appeals for the Eighth Circuit entered on May 23, 1944 (Pro. 24), affirming and enforcing an order of the Board issued against petitioner (R. 102-103).[1]

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[1]The decree was entered in a proceeding instituted by petitioner for review of the Board's order finding that petitioner had interfered with and coerced its employees in the exercise of their right to join a labor organization of their own choosing. The Board's answer requested enforcement of its order.

The record, though now bound under one cover, consists of four volumes. The first volume contains the proceedings before the Board and is referred to herein as (R). The second volume contains the portions of the record printed by petitioner as an appendix to its brief in the Circuit Court of Appeals and is referred to herein as (P. A.). The third volume contains the portions of the record printed by the Board as an appendix to its brief in the Circuit Court of Appeals and is referred to herein as (B. A.). The fourth volume contains the proceedings in the Circuit Court of Appeals and is referred to herein as (Pro.).

Opinions Below.

The opinion of the Circuit Court of Appeals (Pro. 6-23) is not yet reported. The findings of fact, conclusions of law, and order of the Board (R. 90-103) are reported in 51 N. L. R. B. 116.

Jurisdiction.

The decree of the Circuit Court of Appeals was entered on May 23, 1944. Jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10(e) and (f) of the National Labor Relations Act.

Questions Presented.

1. Whether the constitutional concept of free speech as guaranteed by the First Amendment presents "a question of fact for the Board" whose determination thereof is not subject to judicial review, as held by the Circuit Court of Appeals, or, whether the question is one of fundamental law, always open for determination by the courts.

2. Whether utterances by an employer (who has no background of unfair labor practices or history of hostility to unions) to its employees merely expressing a preference for one of two rival unions are, when standing alone, privileged and protected as free speech, as a matter of law, by the First Amendment to the Constitution.

3. Whether a finding and conclusion by the Board—that a statement made by an employer to his employee coerced the employee—*when it is shown affirmatively* the statement did not coerce the employee, is "supported by evidence."

4. Whether an inference drawn and finding made by the Board, that petitioner's department foreman Valnoski

knowingly permitted a union petition to be circulated in the plant—based solely on the fact of Valnoski's presence at the time at some point in the three-story plant which was one block long and one-half block wide—is "supported by evidence," when every witness who testified on the point swore that the petition was always presented secretly and when Valnoski was not present.

5. Whether the signing of a collective bargaining contract with an independent union (held not to have been instigated, formed or supported by the employer) which represents a clear majority of the employees, constitutes unlawful support to the independent union.

Statute Involved.

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., sec. 151, *et seq.*) are set forth in the Appendix, *infra*, pp. 27-28.

Statement.

Upon an amended charge filed with the Board by International Association of Machinists, affiliated with American Federation of Labor, on January 9, 1943 (R. 17), the Board, on February 23, 1943, issued its complaint against petitioner and a local union of petitioner's employees named "Employees Benevolent Association," hereinafter called the "Association," in substance charging petitioner with having, between August 15 and September 25, 1942, instigated, formed and dominated the Association, and with having thereby engaged in an unfair labor practice within the meaning of Section 8(2) of the Act, and charging petitioner with having, since August 1, 1942, interfered with, restrained and coerced its employees in the exercise of their right to form, join or assist labor organi-

zations of their own choosing, and with having thereby engaged in unfair labor practices within the meaning of Section 8(1) of the Act (R. 19). Petitioner answered, denying each of said allegations (R. 29).

After the taking of evidence before a trial examiner who filed an intermediate report (R. 32-61), the Board on July 24, 1943, issued its decision and order (R. 90-103) finding and holding that the record did not justify a finding that petitioner had instigated, formed or dominated the Association or had committed an unfair labor practice in violation of Section 8(2) of the Act, and reversed the trial examiner's findings to the contrary and dismissed that charge from the complaint (R. 101); but the Board held that petitioner had interfered with, restrained and coerced its employees in the exercise of their right of self-organization in violation of Section 8(1) of the Act (R. 99).

There was no evidence whatever of any background or history of union hostility by petitioner, or that petitioner had ever been, or had ever previously been charged with being, in any way unfair or dominating in its labor relations.

1. The evidence disclosed that, beginning about August 15, 1942, the employees discussed among themselves the merits of affiliated and unaffiliated unions as they ate their lunch in a driveway along the north wall of the plant, as they worked in groups at odd jobs throughout the large 3-story building, and on their way to and from work (P. A. 23, 24, 25, 26, 36, 54). Some, including one Borner, favored an independent union; others, including one Arnold, favored the International Association of Machinists (P. A. 15, 18).

There was evidence that in the latter part of August, 1942 (P. A. 26), trouble arose on a screw machine and

petitioner's department foreman, Valnoski, was called to repair it, and did so (P. A. 27) in the presence of six employees, including Arnold (P. A. 26). When the repair was completed, Arnold testified he questioned Valnoski as to the number of machines, output and wages, and what labor organization represented the employees, in petitioner's New Jersey plant, and "wasn't very successful" in procuring information, as Valnoski walked away (P. A. 27, 37), but stopped at a drinking fountain near an elevator. Arnold followed and there showed Valnoski his A. F. of L. membership card (P. A. 27) and again asked Valnoski what union represented the employees in the New Jersey plant. Respecting Valnoski's reply, Arnold testified:

> "He said they had a company union back in New Jersey or an independent union back in New Jersey, and if the employees there weren't satisfied they would get into either the C. I. O. or A. F. of L., and he stated they didn't want any A. F. of L. or C. I. O. here because they couldn't transfer from one department to the other" (P. A. 27).

No other employee followed Valnoski to the drinking fountain and at the time of the alleged utterance Valnoski and Arnold were alone (P. A. 37). Valnoski did not volunteer any information (P. A. 32) and the only information Arnold got was what he "rather dug out of" Valnoski (P. A. 33). There was no other conversation as, after Valnoski made the statement, he left (P. A. 38). This is the only evidence concerning the matter.

There was evidence that in the last of November or the first of December, 1942 (P. A. 41),[2] Valnoski called employee Dillon into his office concerning defective materials

[2]Therefore more than two months after the employees had organized and the one-year collective bargaining contract of September 25, 1942, had been executed.

run by Dillon (P. A. 41) and in that discussion Valnoski said: "Horseplay would have to be cut out around the building there, and that foolishness of trying to file charges like on this John Southan would have to be stopped" (P. A. 42). Dillon testified he did not know of any charges having been filed at any time respecting John Southan (P. A. 42) and there is no evidence that any ever was made or filed by anyone at any time.

There was evidence that the day before this hearing was commenced before the trial examiner[3] Valnoski, referring to the impending hearing, said to employee Meistrell: "I hear you fellows is going to tell a lot of stuff about me up there. You hadn't better, or it is going to be too bad" (P. A. 117).

The Board found that the utterances were made by Valnoski (R. 94)[4] and it made a specific finding that *these utterances alone* interfered with and coerced petitioner's employees in their right of self-organization, in violation of Section 7 of the Act, and constituted an unfair labor practice within the meaning of Section 8(1) of the Act (R. 99).[5]

On petition for review of the Board's order, petitioner contended in the Circuit Court of Appeals that inasmuch as petitioner had no history or background of union hostility or of unfair or dominating labor practices, and the utterances contained no threat of discrimination or other sanctions in intimidation or denial of the exercise of the

[3]Which was on March 11, 1942 (R. 91), and therefore more than five months after the employees had organized and the one-year collective bargaining contract of September 25, 1942, had been executed.

[4]Thus it is found that Valnoski made only the three statements in a period of more than six months.

[5]That finding was as follows: "We find that by Valnoski's statement to Arnold that the respondent did not want an affiliated union in the plant, by Valnoski's statement to Dillon that foolishness like filing charges would have to stop, and by Valnoski's warning to Meistrell concerning his testimony in the instant proceeding, the respondent has interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act."

employees' right of self-organization guaranteed by the Act, but at most expressed a preference for an unaffiliated union, they were constitutionally privileged free speech under the First Amendment of the Constitution as a matter of law, and could not be held to constitute an unfair labor practice.

The Circuit Court of Appeals decided the issue against petitioner, as follows (Pro. 18, 19):

> "As to petitioner's argument concerning constitutional privilege, Valnoski's remarks related to petitioner's determination to establish the kind of labor organization it desired—an independent union, and while an expression of opinion on labor matters may be protected when such utterances do not constitute coercion under the Act, speech amounting, in connection with other circumstances, to coercion within the meaning of the Act is not protected (citing cases). *The determination of the category into which the remarks fell was a question of fact for the Board; National Labor Relations Board* v. *Virginia Power & Elec. Co., supra, and the Board's finding on the fact may not be disturbed.*"[8]

2. Petitioner also contended in the Circuit Court of Appeals that inasmuch as Valnoski's utterance to Arnold was made to Arnold alone and not in the presence or hearing of others (P. A. 37), and inasmuch as Arnold was at the time a member of A. F. of L. (P. A. 27) and remained a member thereof, and became, says the trial examiner, "one of the union's most active members" (R. 52), it was proven *affirmatively* and without dispute that the utterance did not coerce even the one of petitioner's

[8]Thus the court did not pass upon the merits of petitioner's claim of constitutional privilege but held the question was one of "fact for the Board," whose finding "on the fact" the court, for lack of power, could not disturb.

employees to whom alone it was made, and hence the Board's finding that the utterance interfered with, restrained and coerced petitioner's employees in the exercise of their right of self-organization, in violation of Section 7 of the Act, is not supported by evidence.

The Circuit Court of Appeals decided the issue against petitioner as follows (Pro. 16):

> "The fact that the employees to whom Valnoski's remarks were addressed were not deterred from remaining members of, or joining, an A. F. of L. union, did not preclude a finding of coercion. Where the conduct was coercive, as found here, it is *not necessary to show* that the coercive conduct had its desired or intended effect." (Emphasis supplied.)

3. Between the 1st and 10th of September, 1942 (P. A. 54), employee Borner, with studied secrecy and when foreman Valnoski was not present, presented to the employees, on their lunch hour, and as they worked in small groups about the machines and at odd jobs throughout the buildings, and sometimes in the toilet rooms, an Association membership petition and solicited them to join the Association.[7] By September 10, 1942, he had obtained upon the petition the signatures of forty-four (P. A. 78) of petitioner's sixty employees (P. A. 106). Every witness—many of them Board witnesses—who testified on the subject, stated that the petition was presented secretly

[7]Concerning the secret manner in which he presented the petition to the employees Borner testified: "Well, we was working close together on the machines, and we talked about it around the machine there, when Mike (Valnoski) or Harvin or no one was around. Why, if they wanted to sign it, I would let them sign it. Sometimes they would sign it at noon hour and sometimes in the toilet" (P. A. 55, 56). When asked why he took the petition in toilet rooms for signatures he replied, "Well, so no one would see" (P. A. 56). He testified further, that so far as he knew, no foreman or supervisor of the company ever saw him present or procure a signature to the petition (P. A. 56).

and never displayed in the presence of any officer, foreman or supervisor of petitioner.[8]

The Board found that no witness testified that Valnoski saw the petition circulated, and that "several witnesses" testified there was no supervisor present when it was circulated (R. 95), and found that "the record does not permit a finding that Valnoski actually saw the circulation of the petition" (R. 95), but in the cross-examination of Valnoski and in impeachment of his testimony the Board offered in evidence (P. A. 100) a statement written by a Board attorney (P. A. 99) and signed by Valnoski in January, 1943,[9] which contained the sentence: "I knew Borner and Bretzer were circulating a petition and distributing cards in the plant." And though Valnoski denied he had such knowledge at the time the petition was being circulated, and explained that he had been told of the fact since the circulation of the petition and before the signing of the statement in January, 1943 (P. A. 99, 100, 101), the Board declined to "credit Valnoski's denial" (R. 95) and, treating the impeaching statement as affirmative evidence of knowledge and, on that basis and on the basis that Valnoski was in the plant when the peti-

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[8]Board witness West so testified (P. A. 22). Board witness Arnold stated that he could not say any foreman ever saw the petition circulated (P. A. 31). Board witness Dillon testified that the petition was presented to him when he and others were working in a group at a machine and that Valnoski was not about (P. A. 44). Board witness Meistrell testified that he worked with Borner (P. A. 49) and that Borner presented the petition to him and others in their group when no foreman or supervisor was present (P. A. 50). Association witness Borner testified that he presented the petition to employees as they worked "close together on the machines" (P. A. 55), sometimes as the men ate their lunch in groups and sometimes in the toilet rooms (P. A. 56), and that he took care to see that the circulation of the petition in and about the plant was without the knowledge of the Company (P. A. 56). Association witness Bretzer testified that he never did see the petition at any time when there was a foreman or supervisor around (P. A. 82). Valnoski testified that he never did see any petition or paper circulated in or around the plant (P. A. 94).

[9]A photostatic copy of the statement is shown at P. A. 125.

tion was circulated,[10] the Board concluded that it was "unbelievable," in view of the "widespread" circulation of the petition in the plant over a period of two weeks, during which forty-four of the sixty employees signed it, that Valnoski did not know of its circulation (R. 95). And the Board further concluded, "We believe the record justifies the inference which we draw, that the respondent knew of the circulation of the petition in the plant during working hours" (R. 95).

On petition for review of the Board's order petitioner contended in the Circuit Court of Appeals that, because the evidence on the point shows that the petition was circulated secretly and that Valnoski did not witness its circulation, and the impeaching statement of Valnoski, though his denial thereof be discredited, did not constitute affirmative evidence to the contrary of his testimony, there was no showing of any *fact* engendering, or upon which to base or draw, an inference that Valnoski knew of the circulation of the petition while it was being circulated, and the Board's inference to the contrary is not supported by evidence.

The Circuit Court of Appeals decided the issue against petitioner as follows (Pro. 19, 20):

> "Petitioner argues that there was no evidence that petitioner had knowledge of the circulation of the petition in the plant during working hours, or knowingly permitted the collection of dues or the posting

[10]This building was one block long and about one-half block wide, of three stories and basement (P. A. 42, 43), and at the times in question was being altered and converted from a warehouse into a factory (P. A. 71, 89-104) and the employees throughout the time in question worked in small groups (P. A. 44-47, 55, 71, 73, 80 89, 90). Each group would spend a part of each day in training at an automatic screw machine (P. A. 35, 43, 72, 80, 89) and would spend other parts of the day tearing out partitions, removing debris, cleaning and painting the interior of the building, unloading, uncrating and placing machinery and materials, and similar odd jobs which took them to all parts and on all floors of the building (P. A. 35, 43, 71, 72, 73, 80, 81, 89, 90) where they worked without the presence of Valnoski (P. A. 36, 43, 72, 80, 81).

of the notices in question. It is clear from the evidence that the petition was circulated and signatures were obtained in the plant during a period of more than two weeks. That 44 out of approximately 60 employees signed the petition and that Valnoski was there *present in the plant* and overseeing the workmen and performing duties as foreman during that period. In view of the *probability* of Valnoski's knowledge of the circulation, and *the extent of the circulation*, the Board was not compelled to accept his bald denial of such knowledge. * * * Moreover, Valnoski, in a signed statement to the Board's attorney, stated that he was aware of the circulation of the petition. The Board was entitled to disbelieve his explanation to the effect that he was referring to knowledge gained subsequently. While, as petitioner contends, the signed statement may not amount to affirmative evidence, the inquiry of the Board was directed to the question whether Valnoski knew of the circulation of the petition, and such statement, taken together with the fact *of his presence in the plant* while the petition was in circulation and the procurement of the signatures thereon, justified the finding of the Board that petitioner had knowledge of the fact of its circulation." (Emphasis supplied.)

4. There was evidence that on September 14, 1942, a Lincoln, Nebraska, attorney named Eitel, telephoned petitioner's works manager, Hofmann, and stated he represented a union of the Company's employees and requested a conference relative to a collective bargaining contract, and an appointment was made for 3:00 p. m. the following day (P. A. 105, 106). Hofmann then telephoned L. R. Doyle, the Company's Lincoln attorney, related the conversation with Eitel and asked Doyle to be present at the conference (P. A. 106). At the conference on September 15th Eitel stated that he represented a group constituting a majority of the Company's employees and

wanted to discuss a contract (P. A. 107). Hofmann asked him what evidence he had to show that the group he represented constituted a majority of the Company's employees and Eitel produced the petition containing the signatures of forty-four persons, with two lined out (P. A. 107).[11] Hofmann then called and asked the Company's personnel manager to prepare and present a complete list of the Company's employees, and a short time later that list, showing the Company had 60 employees and their names, was brought into the meeting (A. P. 108). Thereupon Hofmann, Doyle and Eitel checked the signatures appearing on the petition against the names of the Company's employees and found that the 42 signatures on the petition were those of its employees (P. A. 109). Hofmann then asked Doyle what action the Company was required to take. Doyle made reference to the Act and advised that inasmuch as the petition evidenced a clear majority of the employees, the Company was bound to recognize the group, and recognition was granted (P. A. 109). Negotiations between the negotiating committee for the group and its lawyer, and the Company and its lawyer, were commenced and continued to the time of the signing of the contract on September 25th (P. A. 61, 63, 64, 65, 68).

Meanwhile Ray Roth, international representative of International Association of Machinists, on September 16th, telephoned Hofmann from Beatrice, Nebraska, for an appointment and one was arranged for September 18th at 10:00 a. m. (P. A. 2, 3). At the meeting on September 18th Mr. Roth asked that the Company recognize the International Association of Machinists and says he was told by Hofmann, "If I could produce the evidence they would give it consideration" (P. A. 8). Roth declined to present any evidence (P. A. 8). Hofmann then asked

[11]Photostatic copy of the petition appears at P. A. 119.

Roth how many of the Company's employees he represented and Mr. Roth declined to say (P. A. 13, 14).

On September 24th a one-year open shop contract was agreed upon by the Association and the Company which that night was ratified by the Association at a meeting in a public hall (P. A. 69). Meanwhile the group had incorporated (P. A. 61) and Hofmann refused to sign the contract unless the incorporated Association produced evidence of a *dues-paid* membership of a clear majority of the Company's employees (P. A. 68). The Association then produced its minute book, which showed that 37 of its members were current in their dues (P. A. 68, 113, 114), and thereupon the contract was signed on September 25, 1942 (P. A. 115).

The Board, though it held the Association was not "instigated, formed, assisted, dominated or supported" by petitioner, nevertheless concluded that a "neutral employer" would not have recognized the Association under the circumstances and that petitioner, by signing the contract with the Association, bestowed unlawful support upon the Association (R. 100).

Petitioner contended in the Circuit Court of Appeals that, upon the facts, the provisions of the Act compelled it to recognize the Association and that if the signing of the contract constituted support to the Association, it was not unlawful support.

The Circuit Court of Appeals decided the issue against petitioner as follows (Pro. 22):

> "The Board could find such an act, during a period of rivalry between competing unions, and under the circumstances, to be reasonably calculated to indicate the Company's preference and to be a violation of the obligation of neutrality."

Specifications of Error to be Urged.

The Circuit Court of Appeals erred:

1. In holding that what is constitutionally protected free speech presents a question of fact for the Board whose determination thereof is not subject to judicial review.

2. In failing to hold that utterances by an employer to its employee, which contain no threats but at most merely express a preference for one of two rival unions, are privileged and protected as free speech as a matter of law.

3. In holding that a Board finding of coercion, by a statement shown affirmatively not to have coerced, is supported by evidence.

4. In holding that an inference drawn by the Board, contrary to the positive evidence, is supported by evidence.

5. In holding that the signing of a collective bargaining contract with an independent union (held not to have been instigated, formed or supported by the employer) which represented a clear majority of the employees, constituted unlawful support to the independent union.

6. In failing to reverse the decision and order of the Board.

Reasons for Granting the Writ.

1. The ruling of the court below, that what constitutes privileged free speech under the First Amendment to the Constitution "presents a question of fact for the Board * * * and the Board's finding on the fact may not be disturbed," decides an important question of federal law contrary to and in conflict with the decision of this Court in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1. In that case the constitutionality

of the procedural provisions of this Act was assailed. This Court held the Act constitutional upon the ground that the Board's order is subject to review and "upon that review * * * all questions of constitutional right or statutory authority, are open to examination by the court" (p. 47). The decision of the court below not only conflicts with the decision in the *Jones & Laughlin* case, but announces a rule that would render the Act unconstitutional by denying the basis upon which this Court found the Act to be constitutional.

The ruling of the Court below also conflicts with *National Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469, in which there was uncertainty whether a Board finding of interference and coercion was predicated solely upon utterances by the employer, critical of an affiliated union and strongly expressing preference for an independent one, or was predicated upon an anti-union background and other surrounding circumstances constituting a complex of activities. It was held that if the Board's decision was predicated upon the utterances, the Board's order could not stand because they were constitutionally privileged free speech under the First Amendment, and it appearing that the Board "rested heavily" upon the utterances, the decision was reversed and the case was remanded to the Board.

Thus, this Court not only held that what constitutes free speech under the First Amendment is a question of law and open to judicial review, but moreover, treating the question as one of law, reversed the Board's decision, thus holding that the constitutional concept of free speech as guaranteed by the First Amendment presents a question of law, always open to judicial review, and not a question of fact for the Board, beyond judicial

review, as held by the Circuit Court of Appeals in the present case.

The ruling of the Court below also conflicts with the decision of the Second Circuit in *National Labor Relations Board* v. *American Tube Bending Co.*, 134 F. (2d) 993.[12] It also conflicts with the decision of the Third Circuit in *Edward G. Budd Mfg. Co.* v. *National Labor Relations Board*, decided May 12, 1944, not yet officially reported but found in 14 L. R. R. at p. 363;[13] and with the decision of the Fifth Circuit in *Jacksonville Paper Co.* v. *National Labor Relations Board*, 137 F. (2d) 148;[14] and with the decision of the Sixth Circuit in *Midland Steel Products*

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[12]There it was held that the question is one of law, not of fact, and is open to judicial review. A Board finding of coercion had been made, based upon an employer's statement made to its employees on the eve of an election, criticising unions and strongly expressing the employer's "preference for no union whatever." The court held as a matter of law that the utterances were constitutionally privileged by the First Amendment and could not constitute a violation of the Act, and, treating the question as one of law, open to judicial review, reversed the Board's decision.

[13]There the court held that utterances by an employer to its employees, criticising "labor organizations" and recommending organization of an independent union but not involving any intimidating threats, were as a matter of law privileged by the First Amendment and subject to judicial review, saying (p. 364):

> "It can hardly be questioned that the constitutional guarantee protects the employer and employee alike. Thus, to make known the facts of a labor dispute has been recognized as a constitutionally protected right of a member of a union. *Senn* v. *Tilelayers Protective Union*, 301 U. S. 468, 478. And, in *Midland Steel Products Co.* v. *National Labor Relations Board*, 113 F. (2d) 800, 804 (C. C. A. 6), it was appropriately said that 'unless the right of free speech is enjoyed by employers as well as by employees, the guarantee of the First Amendment is futile, for it is fundamental that the basic rights guaranteed by the Constitution apply equally to every person * * *.' The Wagner Act does not purport to authorize a restraint upon freedom of speech in any circumstances. 'Nowhere in the National Labor Relations Act is there sanction for an invasion of the liberties guaranteed to all citizens by the First Amendment'—See, *National Labor Relations Board* v. *Ford Motors Co.*, 114 F. (2d) 905, 914 (C. C. A. 6). Cert. den. 312 U. S. 689. Had there been any such provision in the statute, it would have been invalid as in contravention of the First Amendment."

[14]It was there held (p. 150) that "it is the province of the Board to determine whether words were spoken or acts were done. However, the legal effect of the words spoken or such acts done, and a determination of whether or not they amounted to a violation of the Act, may be a legal question and within the power of the court to determine."

Co. v. *National Labor Relations Board*, 113 F. (2d) 800;[15] and with the decision of the Seventh Circuit in *Jefferson Electric Co.* v. *National Labor Relations Board*, 102 F. (2d) 949;[16] and with the decision of the Ninth Circuit in *National Labor Relations Board* v. *Union Pacific Stages*, 99 F. (2d) 153;[17] and with the decision of the Tenth Cir-

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[15]The court held that a Board finding of coercion based upon an utterance of a general superintendent, that the men in another of the company's plants were "disgusted with unionism," presented a question of law, open to judicial review, and held that inasmuch as the utterance contained no intimidating threat, it was privileged by the First Amendment and could not be held to constitute a violation of the Act; and said (p. 804):

> "Bearing in mind that the dissemination of information concerning facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution, we think the same principle applies *a fortiori* with reference to this simple conversation wholly lacking in any element of threatened discrimination because of union membership or activity. Unless the right of free speech is enjoyed by employers as well as by employees, the guarantee of the First Amendment is futile, for it is fundamental that the basic rights guaranteed by the Constitution apply equally to every person."

[16]The court held that utterances by the employer to its employees expressing a preference for one of two rival unions but making no threats, were privileged as a matter of law, and a Board finding that employees were coerced by the utterances was subject to judicial review, saying (p. 956):

> "The most that can be made out of the record is that petitioner was showing a preference toward the brotherhood but extended acts of cooperation toward both unions * * * (p. 957). It does not follow that the mere showing of a preference and acts of cooperation constitute interference with an employee in the exercise of the rights guaranteed under the Act."

[17]In this case the court held that the question whether utterances made by the employer to its employees were privileged under the First Amendment, presented a question of law, subject to judicial review, and said (p. 178):

> "It is difficult to think that Congress intended to forbid an employer from expressing a general opinion that an employee would find it more to his advantage not to belong to a union. Had Congress attempted so to do it would be in violation of the First Amendment. The right of workers to organize freely must be conceded. It is a natural right of equal rank with the great right of free speech, protected by the Constitution. But the right of the workers to organize is not destroyed by expressions of opinion of the employer or employee, such as referred to above. The case is different where the employer makes use of threats to prevent organization."

cuit in *Boeing Airplane Co.* v. *National Labor Relations Board*, 140 F. (2d) 423.

No contrary holding seems possible when it is remembered that Congress was at pains to provide in Section 10(e) of the Act that only "the findings of the Board *as to the facts*, if supported by evidence, shall be conclusive," thus reserving all questions of law, including "all questions of constitutional right or statutory authority" (Jones & Laughlin case, *supra*) for judicial review.

If, as this Court has held, freedom of speech "is the matrix, the indispensible condition, of nearly every other form of freedom," *Palco* v. *Connecticut*, 302 U. S. 319, and if "freedom of speech and of the Press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment," *Thornbill* v. *Alabama*, 310 U. S. 88, 101, and if "administrative justice is consistent, not incompatible, with our (the courts) supremacy of the law," *Jefferson Electric Co.* v. *National Labor Relations Board, supra*, it is inconceivable that the right be judicially held beyond the power of the courts to protect as a matter of law, and within the sole care of lay administrative agencies whose determination of the right may not be judicially reviewed or disturbed.

The statement of the court below that "Valnoski's remarks related to petitioner's determination to establish the kind of labor organization it desired—an independent organization" (Pro. 18, 19) is not only contrary to the evidence, but moreover ignores the fact that the Board

specifically found that petitioner did not interfere with the establishment or formation of the independent union and dismissed that charge of the complaint (R. 101).[18]

Here there is no evidence that petitioner is or ever was hostile to unions, and no evidence of any background or surrounding circumstances to be considered in combination with the utterances. Though the utterance found to have been made by Valnoski to Arnold may be said to have expressed a preference for an unaffiliated union (p. 5, *supra*), none of the three utterances contained any threat in coercion or intimidation of the employee's right to join any labor organization, yet the Board more than "rested heavily" upon them. It made a specific finding that they *alone* interfered with and coerced the employees in their right of self-organization in violation of Section 7 of the Act (R. 99), and the court below answered petitioner's plea of constitutional privilege by saying that whether the utterances were or were not privileged free speech presented "a question of fact for the Board * * * and the Board's finding on the fact may not be disturbed." That holding is so important, fundamental and far-reaching as to shake the cornerstone of the Bill of Rights, and, if the "supremacy of the law" is to be preserved, must, we believe, be reversed.

[18]That finding and dismissal is stated as follows: "In addition to the allegations of interference, restraint, and coercion, the complaint alleged that the respondent instigated, formed, assisted, dominated, and supported the Association, within the meaning of Section 8(2) of the Act. In his Intermediate Report the Trial Examiner concluded that the respondent had dominated and interfered with the formation of the Association. Although we are of the opinion that the respondent's activities constitute inferference within the meaning of Section 8(1) of the Act, we do not believe that the character and extent of these activities, under all the circumstances of this case, justify a finding that the respondent has violated Section 8(2) of the Act. Accordingly, we shall dismiss the 8(2) allegation of the complaint."

2. The Board found that the statement made by Valnoski privately to Arnold interfered with and coerced petitioner's employees in the exercise of their right of self-organization. As previously stated (pp. 5, 7, *supra*), the evidence disclosed that the statement was made to Arnold alone and not in the presence or hearing of others, and that Arnold was at the time a member of A. F. of L. and remained a member thereof and became one of its most active members. The evidence thus established *affirmatively* and without dispute that the statement did not coerce Arnold to whom alone it was made; and the holding of the court below that the Board's finding that the utterance interfered with and coerced petitioner's employees in their right of self-organization was supported by evidence, conflicts with the decisions of this Court in *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, and *National Labor Board* v. *Columbian Enameling & Stamping Co.*, 306 U. S. 292, in which it was held that findings of the Board must be "supported by substantial evidence" which, being more than "a mere scintilla," means evidence "affording a substantial basis of *fact* from which the *fact* in issue can be *reasonably* inferred," and that evidence of mere "hearsay or rumor" or which does no more "than create a suspicion of the existence of the fact to be established" is not sufficient. It "must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."

The ruling of the court below upon the point, saying: "Where the conduct was coercive, as found here, it is *not necessary to show* that the coercive conduct had its desired or intended effect," also conflicts with the decision of the Fourth Circuit in *National Labor Relations*

Board v. *Mathieson Alkali Works*, 114 F. (2d) 796, where, as here, it was shown affirmatively that the utterances did not coerce the employees to whom made, and the court held in that circumstance there was no ground upon which to say that the utterances interfered with or coerced the employees, as it affirmatively appeared they did not, and a contrary finding was not supported by evidence.

The court below applied the inapplicable rule that injury is presumed from unlawful conduct, and, in such case, injury being presumed, it is not necessary, as the court says, "to show" injury. But the ruling ignored the fact that here the utterance was not coercive or unlawful and that the evidence established *affirmatively* and without dispute that the utterance in fact did not coerce Arnold, and no other employee heard it. Thus, the finding of the Board is not supported by evidence and the holding of the court below on the facts present is in conflict with the cases cited.

3. The holding of the court below that the Board's finding, that petitioner, through Valnoski, knowingly permitted the circulation of an Association petition in the plant during working hours and took no action to stop it, is supported by evidence, also conflicts with the decisions of this Court in *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 229, and in *National Labor Relations Board* v. *Columbian Enameling & Stamping Co.*, 306 U. S. 292, discussed at page 20, *supra*.

The ruling of the court below also conflicts with the decision of the Fourth Circuit in *Appalachian Electric Power Co.* v. *National Labor Relations Board*, 93 F. (2d) 985; with the decision of the Fifth Circuit in *National Labor Relations Board* v. *Bell Oil and Gas Co.*, 98 F. (2d) 406, 410; with the decision of the Sixth Circuit in *National*

Labor Relations Board v. *Thompson Products Co., Inc.*, 97 F. (2d) 13, 15; with the decision of the Seventh Circuit in *Jefferson Electric Co.* v. *National Labor Relations Board*, 102 F. (2d) 949, 954; with the decision of the Ninth Circuit in *National Labor Relations Board* v. *Union Pacific Stages*, 99 F. (2d) 153, 177; and with the decisions of the Tenth Circuit in *Utah Copper Co.* v. *National Labor Relations Board*, 139 F. (2d) 788, 790, and *Boeing Airplane Co.* v. *National Labor Relations Board*, 140 F. (2d) 424, 433, which hold that findings by the Board must be supported by substantial evidence which means "evidence furnishing a substantial basis of fact from which the fact in issue can reasonably be inferred" and, in view of "the traditional rule against liability or bad faith," the mere filing of "a complaint by the Board creates no presumption of unfair labor practices under the Act, but it is incumbent upon the one alleging violation of the Act to prove the charges by a fair preponderance of all the evidence," and "the test is not satisfied by evidence which merely creates a suspicion or which amounts to no more than a scintilla or which gives equal support to inconsistent inferences" and that "the inferences drawn must be reasonable inferences generated by the facts" and that "the rule of substantial evidence is one of fundamental importance and is the dividing line between law and arbitrary power."

Here the evidence established without dispute, and it is even found by the Board that Valnoski did not see the petition circulated (pp. 8, 9, *supra*). The statement signed by Valnoski, offered by the Board in impeachment of his testimony and denied and explained by him, though his explanation was not credited by the Board, did not constitute evidence of the truth of the unproved recitals

of the statement nor affirmative evidence to the contrary of his testimony,[19] and the court below so concedes.[20]

This leaves for consideration only the question whether there is basis in the evidence for an inference that Valnoski knew, though he did not see, that the petition was being circulated. The undisputed evidence not only proves that Valnoski did not see the petition circulated, but moreover shows without dispute that Borner, with studied secrecy, presented it to employees only at those times when and places where Valnoski was not at hand. Thus, the evidence shows no more than the fact that Valnoski at the times *was at some other place* in this large three-story building. Hence the evidence, instead of showing "a substantial basis of *fact* from which the *fact* in issue can be reasonably inferred," affirmatively shows just the contrary. Therefore the inference of knowledge by Valnoski, drawn by the Board and upheld by the court below upon the ground of Valnoski's "presence in the plant while the petition was in circulation" and "the extent of the (secret) circulation" (Pro. 19, 20), is not "supported by evidence," appears to indulge a presumption of guilt, to be based on "evidence which merely creates a suspicion," and to abandon the "rule of substantial evidence" for "arbitrary power."

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[19]In *DeBlois* v. *Boylston & Tremont Co.*, 281 Mass. 497, 183 N. E. 823, 831, the court said of a similar situation: "The judge might have disbelieved this testimony but his disbelief would not be affirmative proof of the opposite." Again, in *Rubenstein* v. *Economy Grocery Stores*, 274 Mass. 608, 174 N. E. 922, the court said on the point: "This testimony might have been disbelieved but, of course, mere disbelief of testimony as to facts is not affirmative proof of contrary facts." In *Spiegel* v. *Beacon Participations*, 8 N. E. (2d) 914 (Mass.), the court said: "The circumstance that the trial judge did not believe the testimony of the individual defendants was not proof that their motive was corrupt or that the opposite of their testimony was the truth."

[20]By saying (Pro. 20): "While, as petitioner contends, the signed statement may not amount to affirmative evidence, the inquiry of the Board was directed to the question whether Valnoski knew of the circulation of the petition, and such statement, taken together with the fact of his presence in the plant * * * justified the finding of the Board that petitioner had knowledge of the fact of its circulation."

4. The ruling of the court below, that the signing of the one-year open shop collective bargaining contract with the Association which represented a clear majority of the employees constituted unlawful support to the Association, conflicts with the decision of this Court in *National Labor Relations Board* v. *Link Belt Co.*, 311 U. S. 584, 587, where this Court held:

> "An 'inside' union, as well as an 'outside' union may be the product of the right of the employees to self-organization and to collective bargaining 'through representatives of their own choosing' guaranteed by Sec. 7 of the Act."

The ruling of the court below also conflicts with the decision of the Fourth Circuit in *National Labor Relations Board* v. *Mathieson Alkali Works,* 114 F. (2d) 796, 799, 800, which holds that "it must nevertheless be remembered that independent associations, if free of employer domination, are recognized by the law as proper bargaining agencies and are entitled to recognition as such if they represent the free choice of a majority." And conflicts with the decision of the Third Circuit in *National Labor Relations Board* v. *Swank Products, Inc.*, 108 F. (2d) 872, holding that "the Act does not purport to prohibit plant, or so-called 'company' unions, except where they are linked to the employer."

Here, the Board has found that petitioner did not instigate, form, assist, dominate or support the Association and dismissed that charge from the complaint (R. 101), hence it follows that the Association was the "representative of their (the employees) own chosing," and was not "linked to the Company," and it being certain that 44 of petitioner's 60 employees constituted a majority, the Association represented "the free choice of a majority."

Section 8(5) of the Act provides that: "It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representative of his employees, subject to the provisions of Section 9(a),[21] and the courts have held he must do so promptly[22] and in good faith with the honest purpose of reaching an agreement without delay.[23]

The rival union, although demanding recognition, refused to submit any evidence of representative authority (P. A. 8) or even to say how many employees it represented (P. A. 13, 14) and its representative, Roth, admits that when he asked for recognition he was told that if he "could produce the evidence" the Company "would give it consideration." None was furnished. Certainly, petitioner could not lawfully have recognized it without evidence of representative authority.[24]

Petitioner could not lawfully delay recognition to the group of more than two-thirds of its employees and thus discriminate against them with the view or in the hope that eventually a rival union might secure a majority. To have done so would not only have been unfair but would, as well, have constituted an unfair labor practice under the express provisions of the Act. To have refused to recognize the Association would inevitably have resulted in unfair labor practice. Recognizing it results in this decision. Hence, the effect of this decision is to hold there

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[21]Section 9(a) provides that representatives, for the purposes of collective bargaining, shall be designated or selected by a majority of the employees in a unit appropriate for such purposes.

[22]*National Labor Relations Board* v. *Union Pacific Stages*, (9 Cir.) 99 F. (2d) 153, where the Board contended that a delay of three days in recognizing and negotiating with a union constituted an unfair labor practice.

[23]*National Labor Relations Board* v. *Whittier Mills Co.*, (5 Cir.) 123 F. (2d) 725.

[24]This very circuit has so held in *Texarkana Bus Co.* v. *National Labor Relations Board*, (8 Cir.) 119 F. (2d) 480.

was no way open to petitioner to maintain its innocence, however genuine.

The holding of the court below, that the signing of the contract constituted unlawful support to the Association and therefore adequately supports a finding of unfair labor practice, is erroneous and conflicts with the cases cited.

Conclusion.

The questions raised by the decision below are of substantial public importance. The decision fails to follow applicable decisions of this Court and conflicts with those of other circuit courts of appeals, both as to the proper scope of judicial review and on the merits. It is respectfully submitted that this petition for a writ of certiorari should be granted.

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